No. 82-2128

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
PETITIONERS

v.

LITTON SYSTEMS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the *Noerr-Pennington* doctrine shields petitioners from liability for unlawful monopolization where the anticompetitive activities complained of consist primarily of the voluntary adoption of restrictive practices that were incorporated in tariffs accepted for filing by the FCC with an explicit disavowal of approval, and subsequent efforts by petitioners to mislead the FCC as to the technical necessity for the anticompetitive practices reflected in the tariffs.

2. Whether the district court's instructions, viewed as a whole, erroneously permitted the jury to reject petitioners' *Noerr-Pennington* defense simply because otherwise protected activities were undertaken with anticompetitive intent.

3. Whether a customer is barred from recovering charges paid pursuant to a tariff filed with a regulatory agency where the agency reserved the question of the lawfulness of the tariff upon its filing, and thereafter found the tariff to be unlawful.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

For a number of years petitioners AT&T, et al., allowed customers wishing to interconnect non-AT&T telephone terminal equipment to the Bell network to do so only through the use of an AT&T-provided interconnection device known as a "protective connecting arrangement." In this action filed in the district court by respondents Litton Systems, Inc., et al., a jury determined that petitioners' conduct in initiating and maintaining that interconnection requirement violated Section 2 of the Sherman Act, 15 U.S.C. 2, causing injury to Litton. The court of appeals affirmed the district court's judgment awarding damages to Litton.

1. For many years the Bell System maintained tariff provisions, known as "foreign attachment" provisions, pro-

hibiting its customers from attaching any terminal equipment device not supplied by a Bell operating company to its lines or equipment. See, *e.g.*, Resp. App. 27a n.1. In 1956, such a provision was invalidated in an action brought by the manufacturer of a device designed to be fastened mechanically to a telephone mouthpiece to provide privacy and reduce noise. *Hush-a-Phone Corp.* v. *United States*, 238 F.2d 266, 269 (D.C. Cir. 1956), rev'g 20 F.C.C. 391 (1955). The court of appeals held the foreign attachment restriction unlawful as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental" (238 F.2d at 269). The court of appeals remanded the case to the FCC which then ruled (*Hush-a-Phone Corp.* v. *AT&T*, 22 F.C.C. 112, 113 (1957) (Resp. App. 28a)):

> [A]n inescapable consequence of the Court's opinion is to render such [foreign attachment] tariff regulations unjust and unreasonable insofar as they may be construed or applied to bar a customer from using other devices * * * which do not * * * impair the operation of the telephone system. As we construe the Court's opinion, a tariff regulation which amounts to a blanket prohibition upon the customer's use of any and all devices without discriminating between the harmful and harmless encroaches upon the right of the user to make reasonable use of the facilities furnished by the defendants.

In response, petitioners filed revised tariffs that permitted the attachment of some customer-provided equipment that would not be harmful to the Bell system, but continued to prohibit use of devices which had a direct electrical connection to Bell equipment or facilities, and devices that interconnected a Bell telephone line or channel to any other communications line or channel. See, *e.g.*, *In re Use of the Carterfone Device*, 13 F.C.C. 2d 420, 427 & n.6, reconsideration denied, 14 F.C.C.2d 571 (1968).

These provisions were challenged in 1965 by the manufacturer of the Carterfone, a device designed to inter-

connect a customer's telephone with a mobile radio system. The challenge prompted an FCC investigation.[1] The Commission concluded that the revised tariff restrictions were unlawful because they prohibited the use of the Carterfone and other devices without regard to actual harm caused to the telephone system. *In re Use of the Carterfone Device*, 13 F.C.C.2d 420, reconsideration denied, 14 F.C.C.2d 571 (1968) (Resp. App. 33a-40a, 43a-47a). The FCC held, moreover, that the tariff had been unlawful "since its inception" (Resp. App. 38a), "there being no material distinction between a foreign attachment such as the Hush-A-Phone and an interconnection device such as the Carterfone" (Resp. App. 36a-37a). The Commission invalidated the foreign attachment provisions both as applied to interconnection and to electrically connected devices (Resp. App. 45a & n.4). It invited the carriers to submit new tariffs "which will protect the telephone system against harmful devices," and offered the carriers the opportunity to "specify technical standards if they wish" (Resp. App. 39a).

Petitioners responded with revised foreign attachment provisions that are the subject of this litigation. The new tariffs permitted the connection of customer-supplied terminal equipment, but required any interconnection to be made through a Bell-supplied interface device known as a protective connecting arrangement (PCA). *In re AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 608 (1968), reconsideration denied, 18 F.C.C.2d 861 (1969) (Pet. App. 162a, 165a). Numerous parties objected to the tariff, claiming it violated *Carterfone* and was otherwise unlawful (Pet. App. 166a). The Commission ruled, however, that because the new tariffs did not contravene the express directives of *Carterfone*, which

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[1] Carter had instituted an antitrust suit in the federal courts. *Carter* v. *AT&T*, 250 F. Supp. 188 (N.D. Tex.), aff'd, 365 F.2d 486 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967). The district court deferred to the primary jurisdiction of the FCC, and the Commission then conducted the investigation leading to its *Carterfone* decision.

"dealt with interconnections and not replacements of any part of the telephone system," it would allow the tariffs to become effective pending Commission review (Pet. App. 167a). It emphasized that "in doing so we are not giving any specific approval to the revised tariffs" (Pet. App. 167a), repeating: "[o]ur action is not to be construed as approval" (Pet. App. 168a). The Commission simultaneously ordered its staff to investigate further changes that might be necessary to resolve the "questions presented by the tariff revisions" (Pet. App. 167a-168a).

Reports prepared for the Commission by independent experts in pursuance of this investigation indicated that an appropriate program of standardization and certification could adequately protect the telephone network from harm from customer-provided equipment and facilities. Accordingly, the Commission created two advisory committees to study the possibility of establishing such standards. See Pet. App. 177a. The Commission also initiated a rulemaking to determine whether and under what terms and conditions customers should be permitted to provide their own terminal equipment and any necessary connecting devices. *In re Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972) (Pet. App. 176a-180a).

In 1973, the Commission released for public comment the report of the PBX Standards Advisory Committee, which recommended a certification program for PBX systems.[2] See *First Supplemental Notice*, 40 F.C.C.2d 315 (1973) (Pet. App. 182a-186a).[3] That recommendation was made over the objection of petitioners' representa-

[2] Private branch exchanges (PBX) and key telephone systems (KTS) are telephone systems used for businesses. PBX employs a central console or switching mechanism to allow interconnection of up to several thousand telephones. KTS allows a single telephone set to connect several others through the use of buttons on the telephone. Pet. App. 8a.

[3] A report of the Commission's Office of the Chief Engineer proposing to extend certification to all customer-provided devices was also released for comment (see Pet. App. 183a).

tives on the committee (Pet. App. 20a n.9). At about the same time, AT&T undertook a campaign to oppose certification, declaring its preparedness to do so in public speeches, and then filing comments before the FCC (Pet. App. 20a-21a).

In 1975 the Commission promulgated standards for the registration of terminal equipment other than private branch exchange and key telephone systems. *In re Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS*, 58 F.C.C.2d 593 (1975) (Resp. App. 51a-72a).[4] The Commission concluded that the PCA requirements were an "unnecessarily restrictive limitation on the customer's right to make reasonable use of the services and facilities furnished by the carriers" (Resp. App. 56a). It ordered the carriers not to "require the use of such connecting arrangements or other interface devices or arrangements for FCC registered equipment or protective circuitry, and [not to] impose other tariff conditions contrary to the *Carterfone* policy" (Resp. App. 57a).[5]

Four months later, PBX and KTS were included in the registration program. *Second Report and Order*, 58 F.C.C.2d 736 (1976), aff'd *sub nom. North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) (Resp. App. 79a-93a).

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[4] The Commission was "tentatively of the view that there is no valid distinction as to the potential for harm from any of the excluded classes of devices," but decided to allow interested parties an opportunity for further comment on the inclusion of PBX and KTS equipment (Resp. App. 58a).

[5] The Commission stated (Resp. App. 54a (emphasis in original)):

> The *Carterfone* Decision placed the burden of proof squarely upon the carriers—not the users or this Commission—to demonstrate that a particular unit or class of customer-provided equipment would cause either technical or economic harm to the telephone network * * *; this burden was to be met *prior* to the filing of a tariff restricting the use of such equipment. The information accompanying the tariff revisions filed pursuant to *Carterfone* did not demonstrate * * * [such] harm * * * [absent the] connecting arrangements provided for in the tariff.

The Commission reiterated the unlawfulness of the requirement that such equipment be connected to the network solely through telephone company provided PCAs (Resp. App. 89a).

2. a. In 1976 respondents Litton, et al., filed their complaint in this action, alleging that petitioners had monopolized the sale and leasing of telephone terminal equipment, including PBX and KTS equipment designed to connect a user's business telephones to petitioners' trunk lines, in violation of Section 2 of the Sherman Act (Pet. App. 95a). Litton had entered the telephone terminal equipment market in 1971, and claimed that petitioners' anticompetitive activities had caused it to withdraw from the market in 1974.

Petitioners moved to dismiss the complaint, claiming antitrust immunity under the *Noerr-Pennington* doctrine,[6] the "state action" doctrine, and because interstate telecommunications is a regulated industry. The district court denied that motion (Pet. App. 94a-127a).

A jury subsequently ruled for respondents on some, but not all, of their claims.[7] In special findings of fact, the jury concluded that petitioners had unreasonably filed an anticompetitive interface device tariff, had opposed certification in bad faith, had intentionally delayed the provision and installation of PCAs, had refused in bad faith to sell wiring for customer-provided equipment, and had delayed in making "cutovers" to customer-provided equipment (Pet. App. 21a n.11). The jury found that as a result of petitioners' antitrust violations respondents had suffered actual damages of $92 million. Pursuant to 15 U.S.C. 15 judgment was entered against petitioners for three times that amount.

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[6] See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

[7] The jury rejected respondents' claim of predatory pricing and their claim that petitioners had intentionally provided unduly expensive, inefficient or unreliable interconnection services (see Pet. App. 156a-160a).

b. A unanimous court of appeals affirmed (Pet. App. 1a-91a). The court rejected petitioners' *Noerr-Pennington* defense, holding *Noerr* "plainly inapposite" because petitioners were engaged in private commercial activity, rather than seeking to procure the passage or enforcement of laws (Pet. App. 44a). The unlawful PCA requirement, the court found, was the product of petitioners' business judgment, fashioned in the AT&T board room, not at the FCC (*ibid.*). The court of appeals explained (Pet. App. 44a-45a): "The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent [business] decisions * * * into a 'request' for governmental action or an 'expression' of political opinion." Petitioners' opposition to certification, the court reasoned, was likewise unprotected from antitrust scrutiny because it was "simply the other side of the interface tariff coin" (Pet. App. 47a). Filing and maintenance of the PCA tariff provision necessarily embodied "opposition to the only feasible alternative—certification standards" (*ibid.*).

Alternatively, the court concluded that even if petitioners' activities fell within the ambit of *Noerr-Pennington*, they were covered by the "sham" exception to that doctrine (Pet. App. 48a-54a). The court found that petitioners' attempt to gain FCC approval for the PCA was "baseless" (*id.* at 51a-52a); that their efforts to maintain the PCA provisions were intended to delay, not persuade (*id.* at 53a-54a); and that petitioners affirmatively misled the FCC regarding the technological need for the PCA (*id.* at 52a). This amounted to an "abuse of the administrative process" (*id.* at 53a), and thus fell within the sham exception (*id.* at 54a).[8]

DISCUSSION

The court of appeals' decision is correct, does not conflict with any decision of this Court or of any other court

[8] The court also rejected petitioners' contentions that the jury had been improperly instructed on the *Noerr* defense and that the jury's findings were not sustainable (Pet. App. 54a-63a).

of appeals, and does not raise any issue of clear general importance. Further review accordingly is not warranted.

1. a. The *Noerr* doctrine establishes that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961). The fact that the request for restrictive governmental action is motivated by a purpose to restrain competition does not, by itself, deprive one of the right to seek such governmental action. Indeed, this Court has determined that the legality of conduct directed at obtaining governmental action is "not at all affected by any anticompetitive purpose" the conduct may have had. *Noerr*, 365 U.S. at 140; *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669 (1965). These principles extend to petitioning activities before administrative and judicial bodies as well as before legislators. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

The *Noerr* doctrine is based on the concern that imposing antitrust liability for requesting a governmental body to restrain competition would impair the power of government representatives to ascertain the will of the people and could infringe on the First Amendment right of petition (365 U.S. at 137-138). But *Noerr* immunity is not absolute. From the inception of the doctrine an exception has been recognized for "situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" (*Noerr*, 365 U.S. at 144). One who thus *abuses* the administrative process "cannot acquire immunity by seeking refuge under the umbrella of 'political expression' " (*California Motor Transport Co.*, 404 U.S. at 513). The "sham" or "abuse of process" need not take any particular form. Rather, "[t]here are many * * * forms of illegal and reprehensible practice which may corrupt the administrative * * * processes and which may result in antitrust violations" (*ibid.*).

b. (i) The court of appeals correctly held that petitioners' filing and maintenance of tariffs reflecting their anticompetitive insistence on use of their interface devices does not immunize the conduct described in the tariff. The *Noerr* doctrine excludes from the scope of the Sherman Act private attempts to induce government agencies to restrain competition by *governmental action*. It has no application to private conduct which itself directly restrains competition. Here, the alleged anticompetitive effects stemmed from private conduct subsequently *described* in tariffs, not from any government action taken pursuant to the tariffs.[9] The tariffs were devised and maintained by petitioners. They were not submitted to the FCC to influence some broader agency rulemaking decision or enforcement policy, but simply to comply with the law that governs petitioners as a regulated monopoly.[10] The decision to establish and maintain an anticompetitive policy and to describe it in a tariff is not the type of petitioning activity deemed beyond the Sherman Act, even though a necessary step in the maintenance process is the filing of the tariff with a regulatory agency. *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976) (plu-

[9] According to respondents' evidence, the PCA requirement imposed by petitioners and described in their tariffs operated to prevent petitioners' competitors from competing effectively. The cost of the PCA, which exceeded the cost of renting a single telephone, was sufficient to foreclose sales of Key Telephone systems of five lines or less, 90% of the KTS market (Pet. App. 30a-31a). Petitioners' PCA requirement also frustrated competition by causing customers to doubt the quality of respondents' products (Pet. App. 30a).

[10] The filing of tariffs that describe voluntary private conduct with state or federal agencies as a condition of operating a government-granted monopoly should be contrasted with situations where business entities singly or jointly petition an administrative agency for protectionist rules or market entry decisions. In the latter situation, even though anticompetitive motives predominate, *Noerr* applies, subject to the sham exception; in the former case, *Noerr* has no application to the conduct described in the tariff because no attempt to create new law (or seek enforcement of existing law) is implicated.

rality opinion); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1181 (8th Cir. 1982), cert. denied, No. 81-2278 (Jan. 24, 1983); *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 982 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981).[11]

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[11] Even if the act of filing a tariff with the FCC, viewed in isolation, is regarded as immunized under *Noerr*, the adoption of a private anticompetitive policy or practice which is described in a tariff is not. The act of filing is only one of a series of acts undertaken to devise and maintain the tariff. Although petitioners were required to file tariffs with the FCC, they were under no legal obligation to include the PCA provisions, and they remained free to delete those provisions at any time.

In *Cantor* the plurality stated that "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented * * * is a sufficient reason for conferring antitrust immunity on the proposed conduct" (428 U.S. at 601-602). While Chief Justice Burger and Justice Blackmun wrote separately to address the "state action" issue in the case, neither expressed disagreement with the plurality's view of *Noerr*.

In this case, of course, the agency explicitly declined to lend its imprimatur to the tariff provision at issue (see pages 3-4, *supra*). And petitioners could have revoked the tariffs at any time on their own initiative (see Pet. App. 45a n.32). The court of appeals correctly observed that if petitioners' "conduct in devising and filing the tariffs is immunized because the tariffs were contested and AT&T defended them before the FCC * * * a common regulatory practice designed to protect consumers would instead shield from antitrust liability the very entities the practice seeks to restrain and regulate" (Pet. App. 42a-43a & n.30).

Where Congress intends regulatory review to insulate a regulated practice from the antitrust laws, it has made explicit provision for immunity. Congress has not created an antitrust exemption for practices described in tariffs filed with the FCC, however. Instead, it has provided an antitrust exemption only for certain types of mergers or acquisitions approved by the FCC, see 47 U.S.C. 221 and 222, and has made other regulated practices subject to antitrust scrutiny. *United States* v. *RCA*, 358 U.S. 334, 350-352 (1959); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 726-735 (9th Cir. 1981), cert. denied, No. 81-2359 (Jan. 17, 1983); *Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76, 82-84 (2d Cir. 1981); *Essential Communications Systems, Inc.* v. *AT&T*, 610 F.2d 1114, 1116-1125 (3d Cir. 1979); *Carter* v. *AT&T*, 365 F.2d 486, 497 (5th Cir. 1966), cert. denied, 385 U.S. 1008 (1967).

Perhaps in recognition of this rule of law, petitioners appear to have abandoned their claim that the PCA requirement reflected in their tariffs itself is protected by *Noerr*, and now argue only (Pet. 19-28) that their "opposition to certification" is protected under *Noerr*. Indeed, in this Court, petitioners suggest that the antitrust legality of the conduct described in their tariff filings is "irrelevant" to the judgment (Pet. 20 n.12). Far from being irrelevant, however, the jury's finding, affirmed by the court of appeals, that petitioners' PCA requirement was an unreasonable restraint on competition (Resp. App. 22a) constitutes an alternative basis, independent of the opposition to certification issue, on which the court of appeals' decision could be affirmed. Because there is a readily sustainable basis for the decision below, this Court need not consider whether the court of appeals' discussion of petitioners' opposition to certification merits plenary review. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); cf. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 61-62 n.11 (1975).

(ii) Petitioners' efforts to depict this case as one turning on the question whether a regulated monopolist's opposition to a regulator's proposal to increase competition is violative of the Sherman Act is in any event unfounded. Based upon its review of all of the evidence, the court of appeals concluded that petitioners' activities in opposing certification "embraced much more than merely advocating a position before the FCC" (Pet. App. 48a). Aware of its inability to document any case of harm to its network from interconnections that did not employ the PCA (Pet. App. 26a), and believing that adoption of a certification system was inevitable (Pet. App. 28a), AT&T nonetheless publicly anounced its intention to oppose certification as a replacement for the PCA—a requirement that petitioners' staff and management had recognized to be unnecessary (Pet. App. 20a-21a, 25a-26a). This publicly announced campaign to fight certification may have reduced customer willingness to purchase respondents' equipment for reasons of expense or unfounded concerns

about safety (Pet. App. 30a-31a), and must have signalled to petitioners' competitors that establishment of competition on fair terms would be substantially delayed because petitioners would maintain the PCA requirement until the FCC held it unlawful. These factors led to respondents' decision to withdraw from the market (Pet. App. 32a).[12]

In addition to making unsupportable claims to the FCC regarding the need for the PCA to avoid network harm, AT&T "feigned cooperation with the PBX Advisory Committee's efforts to develop certification standards," [13] and "generally attempted to buy as much time as possible to improve its own competitive position at the expense of Litton and other competitors" (Pet. App. 48a (footnote omitted); see also *id.* at 28a, 29a). This was plainly far more than the mere "expression of opinion" before a governmental agency.

(iii) Even if petitioners' opposition to certification before the FCC, which was but one part of a campaign to oppose certification, were regarded as within the ambit of *Noerr*, there was a substantial basis in the record for the court of appeals' alternate conclusion that the case fell within the "sham" exception to *Noerr*.[14] The court

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[12] Invoking the First Amendment, petitioners claim (Pet. 26) that the judgment below improperly rests in large measure on a speech by AT&T's Chairman, John de Butts, announcing AT&T's intention to oppose certification. Whatever weight the court of appeals may have placed on this particular incident, the court's decision shows that this speech was significant, not for the opinions expressed, but as the public announcement of petitioners' determination to maintain their PCA requirement. *Cf. NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

[13] This "feigned cooperation" was "in accordance with an internal [AT&T] 'Tactics Memorandum' which concluded that withdrawing from the committee would accelerate 'decisions in favor of certification'" (Pet. App. 53a).

[14] The jury found that petitioners opposed certification in bad faith (Resp. App. 23a) and, given their monopoly power, thereby violated the Sherman Act. Petitioners attribute this finding to an allegedly erroneous jury instruction that supposedly caused the

found that AT&T's opposition to certification was not a bona fide attempt to influence agency decisionmaking, but a calculated bid to directly restrain competition by delaying creation of a competitive market structure for terminal equipment—a development that petitioner recognized to be inevitable (Pet. App. 51a-54a). Petitioners also made "baseless claims relative to potential harms" (*ibid.*), knowing "that the interface device was redundant, uneconomic, and unnecessary" (*id.* at 52a, 27a).[15] Moreover, the court found that petitioners had "affirmatively misled the FCC with respect to the need for the PCA requirement and the difficulty of developing certification standards" (Pet. App. 52a).

These activities represent abuse of the administrative process and are not entitled to protection under the *Noerr* umbrella.[16] Nothing in *Noerr* grants a regulated monopo-

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jury to find "bad faith" because the jury found that petitioners opposed certification before the FCC for the purpose of restraining competition (Pet. 26). As indicated below (pages 17-19, *infra*), petitioners mischaracterize the jury instructions. Under the instructions given, it is reasonable to conclude that the jury's finding of "bad faith" is attributable to a belief that, as respondents had argued, petitioners used the administrative process solely for delay.

[15] Petitioners adopt (Pet. 23-26) an overly narrow view of the evidence supporting the court of appeals' characterization of its misrepresentations and baseless claims. For instance, petitioners imply (Pet. 25) that the primary basis for the court of appeals' conclusion that their petitioning activities were "baseless" was an erroneous assumption that the PCA tariff and opposition to certification "violated the 'mandate in *Carterfone* * * *'" The court of appeals did not state or assume that petitioners had "violated" *Carterfone*, however. Rather, the court correctly observed that the tariff did not "square[] with" the *Carterfone* and *Hush-A-Phone* decisions, which conditioned the restrictions on the use of customer provided equipment on a showing of *actual harm* to the telephone network (Pet. App. 51a). But see pages 20-21, *infra*.

[16] Petitioners state (Pet. 22) that "[t]he ultimate test of whether conduct may be penalized as a sham is whether it, *'like intentional falsehoods or knowingly frivolous claims,'* consists of activities that can be penalized without inhibiting debate of public affairs * * *" (emphasis added). The jury was adequately instructed on the sham

list the right to abuse the very process designed to keep the monopoly in check. As the National Association of Regulatory Utility Commissioners observes (Br. 5), governmental bodies charged with regulating the utility industry rely on information supplied by the industry to perform their regulatory tasks. While the *Noerr* doctrine properly assures that ideas and information flow freely, it does not countenance misrepresentations and misinformation calculated to impede, rather than promote, fair and effective regulation. *Woods Exploration & Producing Co.* v. *Aluminum Co.*, 438 F.2d 1286, 1297 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); see also *Hospital Building Co.* v. *Trustees of Rex. Hospital*, 691 F.2d 678, 687, 688 (4th Cir. 1982), cert. denied, No. 82-1633 (Oct. 11, 1983); P. Areeda, *Antitrust Law* ¶ 204.1a, at 27 (Supp. 1982); *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272, 274-279 (D.C. Cir. 1972). Because the sham exception to the *Noerr* doctrine is an independently sufficient basis for the judgment below, there is no occasion to review the court of appeals' conclusion that petitioners' conduct was, in any event, unprotected by the *Noerr-Pennington* doctrine.

c. Petitioners' assertion that the court of appeals' application of the sham exception discloses a conflict among the circuits (Pet. 22) rests on two erroneous assumptions: that their own conduct was "normal and legitimate advocacy"; and that the other court decisions cited hold that sham conduct must be "overtly corrupt." In fact, a

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exception to *Noerr* (see page 19, *infra*). The court of appeals found considerable evidence in the record that would permit the jury to conclude that the standard espoused by petitioners was met here.

Elsewhere, petitioners read the sham exception to encompass only instances where the defendant itself initiates a baseless proceeding (Pet. 23). This limitation is unfounded. For instance, in *California Motor Transport Co., supra*, defendants' unprivileged activities consisted of opposing competitors' license applications. Defendants did not initiate those proceedings but were permitted to comment. See *Trucking Unlimited* v. *California Motor Transport Co.*, 432 F.2d 755, 757 (9th Cir. 1970). The proceedings to which the sham exception extends should be coextensive with those as to which the *Noerr* defense can be asserted.

properly instructed jury and the court of appeals each concluded that petitioners' conduct did not constitute "legitimate" advocacy designed to persuade the agency to adopt a particular rule and was designed instead to delay change recognized as inevitable and to mislead the agency. And the court of appeals decisions on which petitioners rely do not suggest that *Noerr* is applicable where a defendant lacks a bona fide intention to influence agency action or abuses the administrative process, and accordingly are consistent with the decision below.[17]

Contrary to petitioners' assertion (Pet. 24), the decision below does not conflict with those of other circuits insofar as the court of appeals declined to accord "absolute[] protect[ion]" to AT&T's misrepresentations to the

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[17] In *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C. Cir. 1981), cert. denied, 455 U.S. 928 (1982), the defendants had secured anti-competitive regulations by lobbying the Iowa Board of Pharmacy Examiners. The court found "no showing that [defendants] engaged in any but legitimate political attempts to secure governmental action," and no "abus[e of] governmental process" or "baseless" actions. In *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1081 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977), the court noted that the sham exception is applicable where the defendant "is not seeking official action by a governmental body" but found the exception inapplicable, explaining "[h]ere it is clear that defendants were seeking and obtained official action from a governmental body." In *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1366-1367 (10th Cir. 1972), "it [was not] shown that defendants were guilty of fraud, corruption *or misuse* of the state processes." And *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372, 1384 (5th Cir. 1980), cert. denied, 449 U.S. 912 (1980), held that, while submissions made by petitioners to the FCC in defending itself against a complaint charging unlawful refusal to interconnect were protected under *Noerr*, conduct "not directed toward influencing governmental action"—*i.e.*, refusal to interconnect itself—was not entitled to *Noerr* immunity. And while the district court stated in *United States* v. *AT&T*, 524 F. Supp. 1336, 1362-1363 (D.D.C. 1981), that the sham exception clearly applies to conduct that is "overtly corrupt," the court ruled that the exception applies as well to other forms of activity including "subvert[ing] the integrity of the governmental process through misrepresentations."

FCC. The calculated misrepresentations found to deprive petitioners of a *Noerr* defense here were a part of petitioners' overall strategy of obstructing the administrative process. Thus, the court of appeals' ruling here parallels the holding in *Woods Exploration & Producing Co.* v. *Aluminum Co.*, 438 F.2d 1286, 1297 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972), on which petitioners rely (Pet. 24). In *Woods Exploration* the court of appeals held the filing of false information to be unprotected under *Noerr* because the filing was not an attempt to influence new railroad commission policies but to undermine the existing regulatory scheme.[18]

Nor does the district court's decision in *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981), create a "conflict" with the court of appeals' decision here (cf. Pet. 22-23). There, Judge Greene found that most of AT&T's "petitioning activities"—including its position before the FCC in its certification docket—were *Noerr* protected (524 F. Supp. 1363 & n.110).[19] But in practical effect there is no conflict, for Judge Greene also determined that

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[18] *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 231 (7th Cir. 1975), is not inconsistent with the decision below. The court there determined that the use of misrepresentations to induce governmental action did not preclude the application of *Noerr*, but there government action was genuinely sought. Similarly, in *Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978), the court held *Noerr* to apply where misrepresentations were used to influence city officials not to reopen an airport. The court noted that the "sham" exception involves a question of "intent," *i.e.*, whether there was a bona fide intent to influence government action or merely an intent to injure competition directly. While the Seventh and Eighth Circuits determined that the former intent existed in the particular cases before them, the contrary conclusion reached by the jury and the court of appeals here simply reflects the evidence in the record of this case.

[19] Judge Greene's ruling extended *Noerr* protection only to petitioners' FCC filings themselves (524 F. Supp. 1363 n.110) and not to any other activities undertaken by petitioners in opposing certification. The "opposition to certification," for which petitioners were held liable here, encompassed more than filings with the FCC (see pages 11-12, *supra*).

petitioners' maintenance of the PCA tariff during the pendency of the FCC's certification proceeding was not protected under *Noerr* and that the United States had made out a prima facie case that maintenance of this requirement was unlawful under the Sherman Act (524 F. Supp. at 1381). Moreover, Judge Greene's interpretation of the sham exception is entirely consistent with the decision of the court of appeals here. Thus, he recognized that the *Noerr* doctrine is inapplicable where it is "show[n] that defendants subverted the integrity of the governmental process through misrepresentations or similarly unprotected conduct" (524 F. Supp. at 1363). Indeed, Judge Greene found that AT&T's activities in opposing a competitor's application to construct a nationwide digital network were not shielded by *Noerr* where AT&T's internal documents permitted the inference that its "sole purpose in opposing [that] application was to preserve its monopoly and that it well knew that the positions it took before the FCC were baseless" (524 F. Supp. at 1364). Thus any divergence between the ruling below and the ruling in AT&T reflects only the application of consistent principles to the records of two different cases.

d. Petitioners claim that the district court's jury instructions concerning the *Noerr* doctrine were erroneous because they made "the threshold question of the protected character of opposition to certification depend on a finding by the preponderance of the evidence that Bell's 'purpose was to exclude competition' " (Pet. 27 (footnote omitted)). Petitioners mischaracterize the jury charge.

The correctness of the district court's charge must, of course, be gauged not from isolated statements but by reading the instructions as a whole. *United States* v. *Park*, 421 U.S. 658, 674-675 (1975). While the trial court refused to give an instruction proffered by petitioners that "[e]fforts to influence public officials do not violate the antitrust laws, even if they are intended to eliminate competition" (Pet. App. 146a), that was not prejudicial error, for a trial court is not required to in-

struct the jury in the precise form and manner requested by the parties; the instruction need contain only an adequate statement of the law. *Agnew* v. *United States*, 165 U.S. 36, 51 (1897).

Petitioners correctly insist that the availability of *Noerr* protection does not depend on whether one's motive in attempting to influence governmental action is anticompetitive. Indeed, the court of appeals expressly recognized (Pet. App. 40a, 55a n.40) that *Noerr* is not rendered inapplicable solely because petitioning is accompanied or prompted by an anticompetitive motive. But the court of appeals also correctly recognized that, although portions of the jury instructions, if read in isolation, could have been more explicit in this regard, viewed in its entirety the charge correctly instructed the jury (Pet. App. 57a).

Thus, the district court initially instructed the jury (Pet. App. 153a-154a):

> The question for your decision is whether Bell's opposition [to certification or registration programs] was interposed in bad faith for the purpose of excluding competition or whether Bell took this position because it believed that the registration proposals being made were not in the public interest and would not provide sufficient protection to Bell System employees, customers and the telephone network.

To this point, the charge appears to be defective because a jury could improperly conclude that an anticompetitive motive would subject petitioners to liability. Any defect was corrected, however, by a subsequent instruction that "harm to competition" resulting from petitioners' advocacy before the FCC would not render such advocacy unlawful (Pet. App. 155a):

> the First Amendment guarantees that persons or corporations may participate in good faith efforts to influence the passage or enforcement of laws or government regulations or to influence public officials regardless of whether the results of the government action they seek would be harmful to competition.

The district court also instructed that creation of delays by advocating a position before an agency or the

courts "does not constitute wilful exercise of monopoly power as long as the petition or application to the courts is based on a good faith interest in influencing the agency or obtaining a court ruling" (Pet. App. 155a-156a). The court then explained the sham exception to *Noerr*, essentially tracking the language of *Noerr* and *California Motor Transport Co.* (Pet. App. 156a):

> [T]here is an exception to the general rule that efforts to influence public officials do not violate the antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is a mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by a pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, the First Amendment protections are lost and the Sherman Act applies.[20]

The jury instructions given accordingly clearly apprised the jury that efforts to influence public officials, no matter how anticompetitive in motivation, do not violate the anti-

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[20] Petitioners' only complaint concerning this portion of the charge is that the court should have required the jury to find a predicate for application of the sham exception by "clear and convincing" evidence (see Pet. 27 & n.18). The established rule, however, is that an antitrust plaintiff must prove its case by a preponderance of the evidence. *Herman & MacLean* v. *Huddleston*, No. 81-680 (Jan. 24, 1983); Devitt & Blackmar, *Federal Jury Practice and Instructions* § 90.22 (1977). This Court has never suggested that the standard of proof is elevated when *Noerr* issues are raised. In *United Mine Workers* v. *Pennington*, *supra*, the district court was reversed because the jury instructions on the sham exception were defective, but the Court did not intimate any requirement for a "clear and convincing" evidence instruction. See also P. *Areeda*, *supra*, ¶ 203.4a, at 22. The court of appeals observed here that "by requiring a plaintiff to prove that a defendant's conduct was a sham, the Supreme Court has already struck a rough balance between the competing First Amendment and antitrust interests" (Pet. App. 58a).

trust laws unless they fall within the sham or bad faith exception.

e. Petitioners also claim that, even apart from the *Noerr* doctrine, their "conduct cannot be held to violate the antitrust law if it was a reasonable attempt to comply with the then existing state and federal regulatory requirements" (Pet. 27). Petitioners contend that their post-*Carterfone* tariffs were "repeatedly held to comply with existing state and federal regulations" (*id.* at 3-4), and that the "FCC never held that the PCA requirements had been illegal" (*id.* at 4). This argument assumes (see Pet. ii, 28) a version of the facts which neither the jury nor the court of appeals adopted and which is contrary to the actual course of administrative proceedings as characterized by the FCC. In its *Second Report and Order, supra*, calling for the elimination of PCA requirements for PBX and Key Telephone systems, the Commission stated that the "matter now before [us] is a direct outgrowth of, and falls within the overall policy framework estabished by, the Commission's *Hush-A-Phone* and *Carterfone* decisions" (Resp. App. 80a, 82a (footnote omitted)). The Commission pointed to its *Hush-A-Phone* ruling that any tariff regulation that prohibits customer-provided devices, without discriminating between the harmful and the harmless, is unjust and unreasonable (Resp. App. 80a). The Commission stated that *Carterfone* had enunciated "a broad general policy" (*ibid.* (footnote omitted)), and that the issue of whether customers may interconnect their equipment with the telephone network via direct electrical connections "was decided * * * in *Hush-A-Phone* and *Carterfone*" (*id.* at 82a).

The court of appeals did state incorrectly that, as early as *Hush-A-Phone*, the FCC had decided "that AT&T could not exclude 'any device'—*a category clearly including telephone terminal equipment*—absent a showing of actual harm" (Pet. App. 51a (emphasis added)). Whether customers should be allowed to provide their own *telephone instruments* was still an unresolved question at the time of *Carterfone* and was specifically re-

served by the Commission there (Resp. App. 44a; Pet. App. 176a-180a). We cannot say to what extent this error may have influenced the court of appeals' decision. Whether or not the PCA requirement was in technical violation of the *Carterfone* "mandate," however, does not affect respondents' core claim sustained by the courts below: that petitioners devised and maintained an anticompetitive policy, which they incorporated into tariffs, and that petitioners sought to maintain their restrictive practices despite knowledge that they were not necessary to prevent harm to the Bell network (as they had claimed).

Clearly, neither establishment nor maintenance of the restrictive requirements reflected in the PCA tariffs was required by the Communications Act or the Commission's orders. That the FCC accepted the tariff for filing does not shield it from Sherman Act challenge. *Cantor* v. *Detroit Edison Co., supra*; see also *California* v. *FPC*, 369 U.S. 482, 488-489 (1962); *United States* v. *RCA*, 358 U.S. 334, 350-352 (1959). In this case, especially, temporary regulatory acquiescence cannot be viewed as government approval because the FCC expressly reserved judgment in accepting the tariff for filing, and declared the tariff unlawful after it had the opportunity to investigate it (Resp. App. 56a-57a). In so ruling, the FCC noted that AT&T had failed over a seven-year period to establish any of ~~their~~ factual claims that PCAs were necessary to prevent harm to their equipment or personnel (Resp. App. 56a).[21]

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[21] The cases on which petitioners rely in suggesting that their actions were "reasonable attempt[s] to comply with * * * existing [law]" (Pet. 27 n.19) present no conflict for the Court to resolve. *Phonetele, Inc.* v. *AT&T*, 664 F.2d at 737-743, supports rather than conflicts with the court's holding here. *Phonetele* held that AT&T did not, as a matter of law, have immunity for its post-*Carterfone* tariff (*id.* at 733). The court of appeals did state that *if* AT&T could eventually show as a matter of fact that "its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws" (*id.* at 738). The record in this case reflects petitioners' inability to make that showing. In *Mid-Texas, supra,*

2. Petitioners' final claim, that *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922), precludes respondents from recovering charges paid under the filed PCA tariff (Pet. 28), is unfounded.[22] In *Keogh* an antitrust plaintiff was barred from recovering damages for rates that had been investigated and approved by the Interstate Commerce Commission prior to its acceptance of the tariff. The decision rested on the fact that "[t]he instrument by which Keogh is alleged to have been damaged is rates approved by the Commission" (260 U.S. at 161). The Court found that an antitrust damage remedy would frustrate a paramount purpose of the Interstate Commerce Act—the prevention of unjust discrimination among shippers—and would improperly allow an antitrust court to second-guess a rate structure approved by the government agency charged with rate regulation (*id.* at 163-164). In subsequent references to *Keogh*, this Court has always emphasized that it rested on Commission *approval* of the tariffed rates. See *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 452 (1945); *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8

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the Fifth Circuit held that because AT&T's actions in denying competitors interconnection rights were not "compelled" by state regulatory actions, they were not immunized under the Sherman Act (615 F.2d at 1382). The court noted that "Bell's claimed reliance on public interest concerns in denying an interconnection request are relevant to an assessment of Bell's alleged monopolistic purpose or intent" (*id.* at 1381), but that this was an issue of fact. And petitioners' effort to analogize their position to that of the New York Stock Exchange in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), reflects a fundamental misconception respecting their own regulatory position. The Communications Act does not prescribe a policy of "self-regulation" for petitioners. Compare 373 U.S. at 349.

[22] This contention, if valid, presumably would undercut only that portion of the damage award which represented the charges respondents paid for PCAs as customers of petitioners. See *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1276 (9th Cir. 1982); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d at 1179.

(1968); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 272 (1972) (Brennan, J., dissenting). In this case the FCC never approved the PCA tariff and, after investigation, rejected it as unlawful. The court of appeals accordingly properly held *Keogh* inapplicable (Pet. App. 73a-74a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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